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No. 10-1063

Supreme Court, U.S.
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In The

Supreme Court of the United States

ARTHUR STEWARD,

Petitioner,

v.

TOWN OF PARADISE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is a litigant who elects to submit his federal constitutional claims to a California state court free to thereafter re-litigate the same primary right issues in federal court after an adverse result in state court?

LIST OF PARTIES

All of the parties to this proceeding are listed in the caption.

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the trial court's granting of respondent's motion for summary judgment, has not been reported. It is reprinted in Appendix A of the petition.

The order of the U. S. District Court for the Eastern District of California granting summary judgment in favor of respondent has not been reported. It is reprinted in Appendix B of the petition.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit was entered on December 7, 2010. Petitioner filed his certiorari petition on February 23, 2011. Petitioner invokes jurisdiction of this court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution – Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution – Fourteenth Amendment

All persons born or naturalized in the United Sates, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, except that in any action brought against a judicial officer for

> an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a Statute of the District of Columbia.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On November 3, 2008, Steward filed his complaint for damages in the United States District Court for the Eastern District of California. Said complaint purported to state two claims, a First Claim for taking of property without due process under 42 U.S.C. § 1983, and a Second Claim for taking of property without just compensation, based on inverse condemnation.

On November 21, 2008, the California Third District Court of Appeal dismissed Steward's third state appeal for failure to file an opening brief.

On September 1, 2009, the District Court granted Town's motion for summary judgment, based on a finding that Steward's claims were barred as they already had, or could have, been adjudicated in State Court.

On December 7, 2010, the Court of Appeals for the Ninth Circuit affirmed the U. S. District Court's granting of the Town's motion for summary judgment.

II. FACTS RELEVANT TO THE PETITION

Steward was the owner of three contiguous parcels in Paradise, Butte County, California, bounded on the west by a public road known as The Skyway and on the east by an old Southern Pacific right-of-way. Berkshire Way, another public road, lies east of the railroad right-of-way.

Prior to 1986, Steward had a license from Southern Pacific to cross the railroad's right-of-way. The license was revocable upon 30 days notice. Based on the license, Steward put in a drainage culvert and maintained a private driveway across the right-of-way.

In April of 1986, the railroad deeded the right-of-way to the Town, thereby revoking Steward's license. The Town was acquiring the right-of-way for the purpose of putting in a recreational trailway.

Starting in 1988, the Town requested Steward to remove the driveway and culvert, but he refused. After continuing requests from the Town and continuing refusals by Steward, the Town removed the culvert and crossing on approximately March 23, 1988.

Over twenty (20) years of litigation ensued in the trial and Appellate Courts of California, primarily in

Steward v. Town of Paradise, Butte County Superior Court Case No. 104360 (phase I), filed November 27, 1989; *Steward v. Town of Paradise*, Butte County Superior Court Case No. 123908, filed December 10, 1999; and *Steward v. Town of Paradise*, Butte County Superior Court Case No. 104360 (phase II), filed September 4, 1991.

All of Steward's allegations against the Town centered on one single act, the Town's removal of the culvert and crossing in 1988. Causes of action pled included claims for fraud and deceit, trespass, conspiracy, intentional interference with contract, quiet title, conversion, inverse condemnation and violation of U. S. constitutional rights.

After three California trials, two by court and one by jury, and three California appeals, counting the one recently abandoned by Steward, several relevant determinations emerged:

(1) Steward had no property interest of any kind in the railroad right-of-way, until September of 2002, when he obtained a quitclaim deed from the heirs of Rosslyn Jones, who had been determined to be the owners of the underlying fee in the railroad right-of-way.

(2) Town had no property interest in the railroad right-of-way until March 23, 1993, when it acquired a vested right to use the right-of-way for recreational trailway purposes pursuant to California Civil Code § 1009.

(3) Other than Steward's claim for conversion, based on removal of his culvert, which claim was resolved by stipulation of the parties, all of the other Steward claims through the State Court proceedings, including inverse condemnation and violation of U. S. constitutional rights, were adjudicated adversely to him.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED BECAUSE PETITIONER ELECTED TO SUBMIT HIS FEDERAL ISSUES TO STATE COURT AND ONLY SOUGHT RELIEF IN FEDERAL COURT AFTER AN ADVERSE JUDGMENT IN STATE COURT

In the case at bar, Steward alleges that in 1988, the Town wrongfully removed his private crossing over the railroad right-of-way abutting the eastern boundary of his property. He claims that the removal constitutes a taking without due process of law (first claim) and that such taking is actionable under an inverse condemnation theory (second claim).

Both of those issues were adjudicated adversely to Steward in the California trial court. The federal civil rights claim, which was the Sixth Cause of Action in the First Amended Complaint in *Steward v. Town of Paradise*, Butte County Superior Court Case No. 104360, was eliminated when Judge Kelly granted the Town's motion for judgment on the pleadings on

October 27, 2006; and the inverse condemnation claim, which was the Second Cause of Action in the Second Amended Complaint in *Steward v. Town of Paradise*, Butte County Superior Court Case No. 104360, was eliminated when Judge Kelly granted the Town's motion for judgment on the pleadings on January 26, 2007.

A judgment on the pleadings, if it attacks the sufficiency of a complaint in stating a cause of action, serves the same function as a general demurrer. *MacIsaac v. Pozzo*, 26 Cal.2d 809 (1945); *Tiffany v. Sierra Sands Unified School District*, 103 Cal. App. 3d 218, 222 (1980); *Orange Unified School District v. Rancho Santiago Community College District*, 54 Cal. App. 4th 750, 764 (1997). And a judgment following the sustaining of a general demurrer is on the merits and provides the basis for res judicata. *Pollock v. University of Southern California*, 112 Cal. App. 4th 1416, 1427-1428 (2003); *Ojavan Investors, Inc. v. California Coastal Commission*, 54 Cal. App. 4th 373, 383-384 (1996); *Kanarek v. Bugliosi*, 108 Cal. App. 3d 327, 334 (1980).

The following principles, which are apropos to the present discussion, are found in the Ninth Circuit case of *Holcombe v. Hosmer*, 477 F.3d 1094 (9th Cir. 2007). That case involved the question of whether an adverse judgment in a prior Nevada state court proceeding in which a section 1983 claim could have been brought, but was not, precluded the bringing of a section 1983 claim in federal court. The following discussion began on page 1098:

I. Claim preclusion bars litigation of claims that were or could have been raised in a prior action, including claims under § 1983.

[1] "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U. S. 90, 93 (1980). "Claim preclusion is a broad doctrine that bars bringing claims that were previously litigated as well as some claims that were never before adjudicated." *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 327 (9th Cir. 1995).

[2] Claims under 42 U.S.C. § 1983 are subject to claim preclusion even if the litigants do not actually litigate the federal claim in state court. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U. S. 75, 83-85 (1984) (holding that petitioner's § 1983 claim is subject to claim preclusion); *Allen*, 449 U. S. at 97-99 (discussing history of § 1983 and rejecting argument that Congress exempted § 1983 claims from preclusion by state court judgments). In *Migra*, the Supreme Court specifically rejected the argument that a § 1983 claim that could have been, but was not raised in a state-court proceeding can avoid the preclusive effect of res judicata. *Migra*, 465 U. S. at 84-85. Therefore, Holcombe's § 1983 claim is not exempt from preclusion under the doctrine of claim preclusion.

II. Under Nevada law, Holcombe's § 1983 claims are precluded by the state court judgment.

A. Federal courts must apply Nevada law concerning claim preclusion to a prior Nevada state court judgment.

[3] "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered" under the Constitution's Full Faith and Credit Clause and under 28 U.S.C. § 1738. *Id.* at 81. Accordingly, the court applies Nevada law concerning claim preclusion to the Nevada judgment.

Based on the above principles, it is clear that the federal courts must apply California law concerning claim preclusion to the case at bar. The claim preclusion aspect of *res judicata* under California law is set forth in *Mycogen Corporation v. Monsanto Chemical*, 28 Cal.4th 888 (2002), as follows:

Res judicata describes the preclusive effect of a final judgment on the merits. *Res judicata*, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them . . . A clear and predictable *res judicata* doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a

> single suit; if not brought initially, they may not be raised at a later date.

California law defines a "cause of action" for *res judicata* purposes by analyzing the primary right at stake. A "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. *LeParc Community Association v. Workers' Compensation Appeals Board*, 110 Cal. App. 4th 1161, 1170 (2003).

As the court in *Tensor Group v. City of Glendale*, 14 Cal. App. 4th 154, 160 (1993), puts it:

> If two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.

Eickman v. Fotomat Corporation, 147 Cal. App. 3d 1170 (1983), adds further clarification at page 1175:

> The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong. If the same primary right is involved in two actions, judgment in the first bars consideration not

> only of all matters actually raised in the first suit but also all matters which could have been raised.

The facts underlying the instant action, as well as the prior actions in the state courts, are precisely the same – the Town removed Steward's culvert and crossing in 1988. The same primary right litigated in state court is being invoked again in federal court. Thus, Steward's federal action is barred by the doctrine of claim preclusion.

Steward is not aided in his petition by his reference to *Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674 (9th Cir. 2009) and *England v. L. A. State Board of Medical Examiners*, 375 U. S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). The plaintiffs in both of those cases initiated their lawsuits in federal courts, where they were then directed to state court. The Los Altos plaintiffs expressly reserved in state court their right to pursue the federal questions in federal court. The *England* plaintiffs were excused from making such an express reservation in state court, as the law at that time was somewhat unsettled and they had been forced into state court only after invoking federal jurisdiction.

In contrast, Steward chose to invoke the jurisdiction of the state court at the outset, and he submitted his federal civil rights claim to the state court. It was only after receiving an adverse result in state court that he decided to try again in federal court. This is a classic case of forum shopping.

II. CERTIORARI IS NOT WARRANTED AS THERE ARE NO COMPELLING REASONS UNDER U. S. SUPREME COURT RULE 10 TO GRANT THE PETITION

Steward cites no cases in which a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter (Rule 10(a)); nor does Steward cite any cases in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals (Rule 10(b)); nor does Steward cite any cases in which a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court (Rule10(c)).

Further, it should be noted that the entire section of Steward's petition entitled, "Reasons Why Certiorari Should Be Granted," centers on a discussion of California law on the rights of abutting owners. Steward is essentially arguing that this Court should grant certiorari because the California trial court erred in its application of California law. That does not constitute grounds for the granting of a certiorari petition. As is stated in U. S. Supreme Court Rule 10:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

CONCLUSION

Steward has raised no compelling reasons under Rule 10 for granting his petition for a writ of certiorari. Therefore, the petition should be denied.

Respectfully submitted,

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